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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

PETITION OF RESPONDENT FOR REHEARING AND CERTIFICATE OF COUNSEL.

SAMUEL H. CADY,
WILLIAM T. FARICY,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
275 E. 4th Street,
St. Paul, Minnesota.
Attorneys for Respondent.

NELSON J. WILCOX,
Of Counsel.

CHICAGO LAW PRINTING CO., 111 NORTH WACKER DRIVE (COR. WASHINGTON ST.)

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PETITION FOR REHEARING.

Comes now the above named respondent, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and presents this its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

This Court's Opinion.

In the opinion filed March 11, 1935, this Court holds that because there was evidence on which the jury might have found (1) that the handhold was not secure for use strictly as a handhold (2) that use of the handhold as a foot brace was a customary, natural and not unusual one; (3) that such use did not subject the handhold to appreciably greater

strain than when used strictly as a handhold (4) therefore for such use of the handhold Swinson was entitled to assume it was secure; and as failure of the handhold was the proximate cause of his injury, the trial Court erred in directing a verdict for respondent.

I.

No substantial evidence that handhold was not secure for use strictly as such.

When used strictly as a handhold the employe would grasp it with his hand while standing with both feet on the ground. Manifestly any testimony with respect to the comparative strain on the handhold while being used as a foot brace and while being used to grasp with the hand must be mere speculation. No effort was made to use the appliance as a handhold and, therefore, no one knew or could express an opinion as to whether it was secure for that purpose. No one knows how much foot pressure Swinson exerted on the handhold when it gave way. When originally affixed the handhold might have withstood foot pressure far in excess of that to which Swinson subjected it. After being in use for some time it might not withstand such foot pressure and yet be secure for use strictly as a handhold.

Swinson admits that on the morning of the day of the accident he applied foot pressure to the handhold and it appeared to be secure (R. p. 9-10). This would indicate it was secure for use strictly as a handhold. Other than the testimony relative to the condition of the running board after the accident, the only other testimony relating to alleged insecurity for use strictly as a handhold was that of the witness Lush. He expressed the opinion that *a* grab-

iron used in the usual and ordinary way should sustain more strain than a man could exert on it in releasing a brake (R. p. 63). Whether it would or not this is far from proof that this handhold was insecure for use strictly as such. In the absence of proof that prior to the accident the handhold was hanging down or in such condition as to make is obviously insecure for use strictly as a handhold and in the face of Swinson's admission that on the morning of the accident it withstood foot pressure without evidencing any insecurity, how can a jury be permitted to enter the realm of speculation and find that it was insecure as a handhold merely because it gave way under the foot pressure exerted. Such foot pressure itself would tend to make insecure a handhold otherwise secure for its intended use.

II.

If congressional intent is to depend on the finding of a jury, construction of the Safety Appliance Act will not be uniform throughout the United States.

This Court was asked to construe the Safety Appliance Act so as to determine the intent of Congress as to the purpose for which secure handholds were required. In effect it held that Congress intended the handhold to be secure so as to withstand the strain incident to its use strictly as a handhold, but in the opinion permits recovery for injuries resulting from its failure when being used for any purpose which a jury may find is customary, natural and usual, and this notwithstanding the fact that when the Act was passed such use was unknown and not contemplated and Congress later required, in other Acts, appliances for employees to stand, walk and brace their feet upon.

A jury in Minnesota may find that use of the handhold as a foot brace is a customary, natural and usual one, while a jury in Illinois may find the reverse. In the one State the employee is protected by the Act and in the other he is not. In the one State the jury legalizes this unsafe practice and in the other it does not.

Whether the employee is entitled to the protection of the Act depends upon the finding of a group of laymen, the jury. Certainly, Congress intended the Safety Appliance Act to have uniform application to all within its purview and did not intend to limit its protection to those whose use of the appliance a jury should find was usual, customary and natural years after the Act's passage.

Under the Court's opinion, except where the handhold is being used strictly as such, the Act will receive as many different constructions as there are juries to pass upon the question of use.

III.

The opinion disregards previous decisions holding breach of duty imposed for benefit of one person, no basis for recovery by another, even though performance of such duty would have averted injury to such other person.

Under the opinion a jury might find that the violation of the Safety Appliance Act consisted of respondent's failure to maintain the handhold secure for use strictly as a handhold. Stated differently the holding is that because Swinson's injury was due to the insecurity of the handhold for use strictly as a handhold, he may recover if the strain he subjected it to was not appreciably greater than that incident to its use strictly as a handhold.

The decisions of this Court in *St. L. and San Fran. R. R.* v. *Conarty*, 238 U. S. 243, *Lang* v. *N. Y. Cent. R. R. Co.*, 255 U. S. 455, *Chesapeake & O. Ry. Co.* v. *Nixon*, 271 U. S. 218, and *Chesapeake & O. Ry. Co.* v. *Mihas*, 280 U. S. 102, are to the contrary. In each of these cases the employe's injury was due to a breach of duty owed another. There, as here, the performance of the duty to another would have averted the injury.

The couplers involved in the *Conarty* and *Lang* cases were defective in violation of the Safety Appliance Act relating to couplers. Had they not been, neither Conarty nor Lang would have been injured. At the moment of accident these couplers were not subjected to any test more severe than that incident to a coupling operation. This Court denied recovery as for a violation of the Coupling Act, not because the coupler if intact would not have afforded the protection necessary to avert injury to these employes, but solely because they were attempting to utilize the couplers for a purpose for which Congress did not require them.

Likewise in the *Nixon* and *Mihas* cases the employes involved would not have been injured had the carrier performed the duty it owed someone else. This Court denied recovery because no duty owed Mihas and Nixon had been violated.

Here the question is not whether Swinson was injured due to respondent's failure to maintain the handhold secure for use strictly as such, but rather whether Congress required the handhold to be secure so that he could exert foot pressure thereon.

Neither *Fairport, Painesville & Eastern R. R.* v. *Meredith*, 292 U. S. 589, or *Davis* v. *Wolfe*, 263 U. S. 239, support so liberal a construction of the Acts. In both the proximate cause of injury was a failure of the instrumen-

tality involved to function for its recognized and intended purpose. The only question presented for decision in the *Wolfe* case was whether the Safety Appliance Act relating to handholds was intended for the protection of men not engaged in coupling operations. Neither of these decisions authorizes recovery by one for a breach of a duty owed another. The Safety Appliance Act requires a secure handhold. Manifestly secure for use strictly as a handhold. If it was intended and must be secure for use as a handhold, then it must be apparent that this Court should not extend the intent of Congress so as to include any use which a jury may find customary and natural.

IV.

No substantial evidence of custom.

Admittedly on 90% of the tank cars in use there was no custom to use the handhold as a foot brace because on these cars it could not be so utilized. Swinson's sole reference to any custom was his statement that he was doing the work of releasing the brake in the customary and usual manner and had seen hundreds of men do it in the same way (R. p. 7). Lush, that where the handhold was in a horizontal position it was customary to use it in setting and releasing brakes (R. p. 62). Other of plaintiff's witnesses had so used it numerous times and had seen others so use it. The so called custom only applied when the brake was so tight that sufficient leverage could not be obtained while standing with both feet on the running board. We submit there is insufficient evidence of such a custom as to charge the respondent with notice that the small portion of the 10% of the cars might occasionally be so used or to require it to recognize this dangerous practice. Certainly it does

not meet the test laid down in *Chicago, M. St. P. Ry. Co.* v. *Lindeman,* 143 Fed. 946 (C. C. A. 8) cited with approval by this Court in *Federal Reserve Bank* v. *Malloy,* 264 U. S. 160-170.

Conclusion and Prayer.

We respectfully direct the Court's attention to (1) the effect of its opinion as a departure from and an extension of the original intent and purpose of the Safety Appliance Acts, (2) the lack of uniformity which will result in the interpretation of the acts in the various states, (3) the inconsistency of the opinion with the Court's previous decisions hereinbefore cited.

The present opinion will require the railroads to submit to any use of a safety appliance that their employees desire to make of it even though such use creates greater hazards to the employee than those the Acts were intended to eliminate. The location, position, and design of this handhold makes it obvious that it is inadequate and unsafe for use as a foot-brace and, such use tends gradually to make it insecure for use strictly as a handhold.

If this Court is unimpressed with the other matters presented in this petition, at least it should not foreclose respondent with respect to the degree of proof necessary in relation to the alleged insecurity of the handhold for use strictly as such and in regard to the alleged custom.

It is of great importance to the railroads of the country that the questions here involved be correctly and definitely decided. It is urged that this opinion's departure from the Court's previous holdings and construction of the Acts should not be finally adopted, at least until the Court has had the benefit of further argument specifically directed to the effect of the opinion and has given further detailed consideration to the matter in the light of such argument.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME
275 E. 4th Street,
St. Paul, Minnesota,
Counsel for Respondent.

NELSON J. WILCOX,
Of Counsel.

Certificate of Counsel.

I, Warren Newcome, of counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WARREN NEWCOME,
of Counsel for Respondent.